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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

C.B.,

Petitioner,

v.

THE SUPERIOR COURT OF STANISLAUS
COUNTY,

Respondent;

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Real Party in Interest.

P.M.,

Petitioner,

v.

THE SUPERIOR COURT OF STANISLAUS
COUNTY,

Respondent;

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Real Party in Interest.

F074267

(Stanislaus Super. Ct. No. 517260)

OPINION

F074354

(Stanislaus Super. Ct. No. 517260)

THE COURT*

ORIGINAL PROCEEDING; petition for extraordinary writ review. Ann Q. Ameral, Judge.

Office of Dependency Associates and Nadine Salim, for Petitioner C.B.

Petitioner P.M., in pro. per.

No appearance for Respondent.

John P. Doering, County Counsel, and Maria Elena Ratliff, Deputy County Counsel, for Real Party in Interest.

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Peter M. (father) and C.B. (mother) by extraordinary writ petition challenge the juvenile court's orders issued at a contested 12-month review hearing (Welf. & Inst. Code, § 366.21, subd. (f))¹ maintaining their now two-year-old daughter, Alayna B., in an out-of-custody status, terminating mother's reunification services and setting a section 366.26 hearing.² We deny the petition.

PROCEDURAL AND FACTUAL SUMMARY

Five-month-old Alayna was taken into protective custody in April 2015, by the Stanislaus County Community Services Agency (agency) after mother was placed on a psychiatric hold and refused voluntary services. Mother had contacted emergency medical services, claiming to have been poisoned. She was found living with Alayna in a foreclosed home that had water, but no electricity. The maternal grandmother reported that mother had untreated bipolar disorder, anxiety and depression.

* Before Levy, Acting P.J., Kane, J. and Poochigian, J.

¹ Statutory references are to the Welfare and Institutions Code.

² On our own motion, we consolidate the petitions in our case numbers F074267 and F074354.

Mother reported that three men broke into her home and beat, tranquilized, tased and raped her. When she woke up, they beat her again until she passed out. When she regained consciousness, she and Alayna were covered with urine. She took Alayna to the emergency room. While there, mother tested positive for methamphetamine. Law enforcement was contacted and Alayna was removed from mother's custody. Mother was admitted for drug-induced psychotic disorder with delusions. She continued to display persecutory delusions over the ensuing weeks. She stated, for example, that someone had kidnapped Alayna. She suspected it was the "FBI/CIA or ISIS." She also said she could see inside her body and saw a blood clot. She perceived that the agency's receptionist gave her the "death eye" and that her attorney was following her and stole her identity.

The juvenile court appointed mother a guardian ad litem and adjudged Alayna a dependent child after sustaining allegations that mother's untreated mental illness placed her at a substantial risk of harm and that mother and father, an inmate in state prison, left Alayna without care or support. (§ 300, subs. (b) & (g).) The court ordered mother to participate in mental health and substance abuse services and to complete parenting instruction. However, the court denied father reunification services based on its findings he was Alayna's biological father and services would not benefit her. (§ 361.5, subd. (a).)³ The agency placed Alayna in foster care.

Mother earnestly participated in her services and made progress particularly in treating her mental illness. After a psychologist diagnosed her as having schizoaffective disorder (bipolar type), she placed herself under the care of a psychiatrist for psychotropic medication management and a clinician for individual therapy. She was also participating in a parenting class and maintaining sobriety. However, she was

³ Father appealed the juvenile court's jurisdictional findings and dispositional orders which we affirmed. (*In re Alayna B. v. Superior Court* (July 27, 2016, F072580) [nonpub. opn.])

having difficulty managing her anger and impulsivity. The agency believed mother needed more time to demonstrate she could safely parent Alayna.

The juvenile court continued mother's reunification services at the six-month review hearing in March 2016. Several weeks later, mother obtained a prescription for Phentermine at a walk-in weight loss clinic. The doctor provided mother a letter stating that the medication could yield a positive result for amphetamine in a urine analysis. Mother informed her social worker she was taking the medication and was advised to consult with her primary care physician. In April, mother tested positive for methamphetamine, marijuana and alcohol. She admitted relapsing and was willing to attend a 10-day detoxification program but refused to return to sober living. Around this same time, the agency became aware that mother was pursuing indiscriminate relationships with men which mother had previously identified as one of her triggers for relapse.

In July 2016, mother tested positive for opiates while participating in outpatient substance abuse treatment. She explained that she was prescribed Tylenol with codeine for pain after the doctor lanced an abscess on her knee. She produced the bottle and only two were missing. She disposed of the pills in the presence of the staff.

In its report for the 12-month review hearing, the agency recommended the juvenile court terminate mother's reunification services and set a section 366.26 hearing to establish adoption as the permanent plan. The agency reported that, while mother's mental health had improved, she undermined her own recovery by her poor choices. In addition, she was generally immature and impulsive, including in her interactions with Alayna during visitation. The agency did not believe that additional services would lead to reunification.

Mother challenged the agency's recommendation and the juvenile court conducted a contested 12-month review hearing in August 2016. Meanwhile, father filed a petition

to modify the juvenile court's order denying him reunification services. (§ 388, subd. (a)(1).) The juvenile court denied his petition.

Monica Leon, mother's substance abuse counselor, testified she was concerned about mother's use of Phentermine and spoke to her about it. Mother did not stop using it right away which also concerned Leon. Instead, mother took the drug one more time. She also counseled mother to abstain from relationships with men and to concentrate on her recovery. Mother told her that she terminated all such relationships the previous June. Leon also testified that mother was promoted to the third phase of her substance abuse treatment program in July 2016 despite her relapse because she subsequently tested negative for all substances, demonstrated "great" insight in group meetings and impressed Leon that she had internalized the information.

Mother testified that her relapse in April 2016 involved alcohol, marijuana and methamphetamine use. She did not consider drinking alcohol a relapse, even though alcohol was her drug of choice. Rather, she thought a relapse only involved use of illegal drugs. She did not believe using Phentermine was a relapse either because it was prescribed for her and she did not realize that Tylenol with codeine contained an opiate or she would not have taken it. She had been clean and sober for approximately four months. Mother told the court that she had been convicted four times of driving under the influence (DUI), the last occurring in March 2013. Prior to that, she completed a 12-month court-ordered DUI school.

Mother further testified her mental disorder had been under control by medication for two months. She was no longer delusional and paranoid and was better able to participate in drug treatment. In addition, she met with a therapist every two weeks.

The juvenile court found it would be detrimental to return Alayna to mother's custody and there was not a substantial probability Alayna could be returned to mother's custody within the nine weeks remaining before the 18-month review hearing. Consequently, the court terminated mother's reunification services and set a section

366.26 hearing. In ruling, the court stated that it was a “very tough case.” The court was impressed by mother’s improved mental health condition, noting how “very delusional” she was when she first appeared. However, the court was concerned she did not have the tools to maintain sobriety, given her involvement in relationships, use of diet pills and pain medication and failure to report her relapse. The court believed mother was seeking some “legal” way to use substances that she knew she should not be taking.

DISCUSSION

I. Mother’s Contentions

Mother contends there was insufficient evidence to support the juvenile court’s findings that returning Alayna to mother’s custody would place Alayna at a substantial risk of detriment and that there was not a substantial probability Alayna could be returned to mother’s custody by the 18-month review hearing. We conclude substantial evidence supports the juvenile court’s rulings as we now explain.

A. Risk of Return

There is a statutory presumption at the 12-month review hearing in a child dependency case that the child will be returned to parental custody unless the juvenile court finds, by a preponderance of the evidence, that the child’s return would create a substantial risk of detriment to the child’s physical or emotional well-being. (§ 366.21, subd. (f)(1).) A parent challenging the juvenile court’s finding of detrimental return bears the burden of showing that the juvenile court’s finding was error. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)

Mother contends the only risk the juvenile court identified in deciding that it would be detrimental to return Alayna to her custody was her risk of relapse. However, mother argues, there is always a risk that a recovering addict will relapse. Therefore, that evidence alone is insufficient to support a finding of detrimental return. We disagree, in this case. Mother had a long history of substance use. She testified that she started drinking alcohol and using marijuana 16 years before, when she was 18 years old and had

been using methamphetamine for about four years. In addition, she had been convicted of DUI four times before 2013 and had completed at least one year-long DUI program. Nevertheless, she accepted prescriptions for and ingested two drugs, including an opiate, thereby placing herself at risk of relapse. Though mother claimed ignorance of the risk, the juvenile court believed she would have been warned of the risk of taking prescription medication through her DUI instruction. In either case, mother's risk of relapse was high. Thus, the juvenile court's determination that Alayna could not be returned to mother's custody without placing her at a substantial risk of detriment was sound.

B. Probability of Return

When the juvenile court cannot safely return a child to parental custody at the 12-month review hearing, it must terminate reunification services and set a section 366.26 hearing unless it finds there is a substantial probability the child could be returned to the parent on or before the 18-month review hearing. In order to determine there is a substantial probability of return, the juvenile court must make all of the following findings: the parent regularly visited the child; made significant progress in resolving the problem prompting the child's removal; and demonstrated the capacity and ability to complete the objectives of the case plan and provide for the child's safety, protection and well-being. (§ 366.21, subd. (g)(1)(A)-(C).)

The juvenile court found mother regularly and consistently visited Alayna and made significant progress but could not find that she demonstrated the capacity and ability to provide for Alayna's safety and well-being. The court stated, "I am very scared about that." The court was very concerned that mother did not have a "handle on [her] triggers," noting specifically her use of prescription drugs.

Mother contends the juvenile court simply concluded she "should have known better" than to take prescription medication and, on that faulty basis, concluded she lacked the ability to maintain her sobriety. Instead, she argues, the court should have concluded that she had the ability to maintain her sobriety in light of her significant

progress. Our role, however, is not to review whether substantial evidence supports a finding the court should have made but, rather, whether the evidence supports the finding the court in fact made. In this case, the 18-month review hearing would have been conducted in late October 26, 2016. The court did not believe mother was able to demonstrate in that short time that she could maintain her sobriety and safely parent Alayna and the evidence supports it. As stated above, mother had a lengthy substance abuse history, had recently relapsed and was indulging behavior that posed a risk of relapse.

We conclude substantial evidence supports the juvenile court's finding there was not a substantial probability of return and its order terminating mother's reunification services.

II. Father's Contention

Father informs this court that with the passage of "The Public Safety and Rehabilitation Act of 2016" (Proposition 57), he anticipates being released from custody within 45 to 60 days of the section 366.26 hearing now set for December 16, 2016 and can take custody of Alayna. Therefore, he contends, the juvenile court unnecessarily set the section 366.26 hearing.

Father erroneously presumes he is entitled to custody of Alayna in the event he is released from custody. Only a "parent" is entitled to custody and only a presumed father is a parent under the applicable dependency statutes. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 439.) Since father is Alayna's biological but not presumed father, he is not entitled to custody of her. Therefore, his release from custody even if imminent is inconsequential with respect to the court's setting of the section 366.26 hearing.

DISPOSITION

The petition for extraordinary writ is denied. This petition is final forthwith as to this court.